TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 246

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

CHARLES G. A. PEARCE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED [redacted], 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 719.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

CHARLES G. A. PFITSCH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States, before you, or some of you, between Charles G. A. Pfitsch, plaintiff, and the United States of America, defendant, a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and changed and speedy justice done to the parties aforesaid in their behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States to be holden at the Capital in Washington, District of Columbia, within thirty days from the date hereof; that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 23d day of October, in the year of our Lord one thousand nine hundred and nineteen.

ALEX GILCHRIST, JR.,
Clerk of the District Court.

[SEAL.]

2 The foregoing writ is hereby allowed.

JNO. C. KNOX,
U. S. District Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alex. Gilchrist, jr., clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to twenty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of United States of America, plaintiff in error, vs. Charles G. A. Pfitsch, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District of New York, in the Second Circuit, this ninth day of February, in the year of our Lord one thousand nine hundred and twenty, and of the independence of the United States the one hundred and forty-fourth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

3 SIR: You will please take notice that a writ of error, of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the clerk of the U. S. Dist. Court, S. D. N. Y.

Dated, N. Y., Oct., 1919.

Yours, etc.,

FRANCIS G. CAFFEY,
U. S. Attorney, Attorney for Defendant, Plff. in Error.

L 19/381. Form No. 336. U. S. Supreme Court, United States of America, plff. in error, versus Charles G. A. Pfitsch, deft. in error, writ of error, with notice of filing. Francis G. Caffey, United States attorney, attorney for plff. in error. Due service of a copy of the within is hereby admitted.

4 PETITION.

District Court of the United States, Southern District of New York.

CHARLES G. A. PFITSCH,
vs.
UNITED STATES OF AMERICA.

To the honorable judges of the District Court of the United States for the Southern District of New York, and to the honorable, the District Court of the United States for the Southern District of New York.

Your petitioner, by Arthur B. King, his attorney, respectfully shows:

I.

The United States of America is a corporation created by the Constitution of the United States, with its principal office in the city of Washington, District of Columbia, and your petitioner alleges, upon information and belief, that within the meaning of the definition in the New York Code of Civil Procedure, the said United States of America is a foreign corporation.

II.

At all times hereinafter mentioned, petitioner resided and still resides in the city of New Rochelle, Westchester County, State of New York, which is within the jurisdiction of this court, and at all of said times was and now is engaged in business in the city of New York, under the trade name of International Bureau of Supplies.

III.

5 On April 18, 1918, your petitioner was the owner of one American full Universal radial drill, with single pulley drive,

with gear box and drill table attached, which were then in the city of New York.

IV.

The fair market value of said drill and attachments on said 18th day of April, 1918, at New York City, was five thousand ($5,000) dollars.

V.

On said 18th day of April, 1918, at said city of New York, the United States of America, by its duly authorized agent, requisitioned said drill and attachments, and took the same from the possession of the petitioner, and has ever since retained possession of the same.

VI.

Thereafter the Board of Appraisers of the War Department of the United States of America made its award #29 to the International Bureau of Supplies for three thousand nine hundred seventy-nine and 50/100 dollars ($3,979.50), which the said Board of Appraisers stated was just compensation for the said property so taken. Your petitioner immediately requested a reconsideration of said award, and a hearing was had before said Board of Appraisers at the city of Washington, at which petitioner was present with counsel, and thereafter said original award was confirmed.

VII.

In connection with said hearing before the said Board of Appraisers, petitioner was compelled to and did expend for transportation, hotel expenses, stenographer's minutes, and other expenses, the sum of one hundred and four dollars ($104.00), and was obliged to and did retain counsel to represent him at said hearing, and has been obliged to and has retained counsel to represent him in this proceeding, and has become obligated to pay said counsel a reasonable fee for his services at said hearing and in this proceeding.

VIII.

No part of said sum of five thousand dollars ($5,000) hereinabove in paragraph fourth referred to has been paid the petitioner by the United States of America, excepting the sum of two thousand nine hundred eighty-four and 63/100 dollars ($2,984.63), which was paid on February 5, 1919, nor has any payment been made to the petitioner by the United States of America for his expenses above in Paragraph VII referred to, nor for his counsel fees above referred to, though due demand has been made

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by petitioner for the payment of said sum of five thousand dollars ($5,000), with interest from April 18, 1918, together with the said further sum of one hundred and four dollars ($104) for expenses, and a reasonable counsel fee.

IX.

By reason of the facts above set forth, there is now due and owing your petitioner from the United States of America the sum of two thousand fifteen and 37/100 dollars ($2,015.37), with interest at six per cent (6%) on five thousand dollars ($5,000) from April 18, 1918, to February 5, 1919, and interest on two thousand fifteen and 37/100 dollars ($2,015.37) at six per cent (6%) from February 5, 1919, together with the further sum of one hundred and four dollars ($104), and a further reasonable sum as and for petitioner's counsel fee in connection with said above mentioned hearing and in this proceeding.

Wherefore, your petitioner prays for a judgment or decree against the United States of America upon the law and the facts and for the sums above set forth, with interest as hereinabove set forth, and further prays that said judgment, in addition to said sums, award your petitioner a reasonable sum as and for the fees of his counsel in
connection with the hearing before said Board of Appraisers
7 above referred to, and rendered and to be rendered in this proceeding, together with petitioner's reasonable costs and disbursements, and for such other and further relief in the premises as may be just.

CHAS. G. A. PFITSCH,
Petitioner.

ARTHUR B. KING,
Attorney for Petitioner,
128 Broadway, Manhattan, New York City.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

Charles G. A. Pfitsch, being duly sworn, says I am the petitioner above named. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

CHAS. G. A. PFITSCH.

Subscribed and sworn to this 27th day of February, 1919.

F. H. MERRILL,
[SEAL OF NOTARY] *Notary Public.*

Certificate filed in New York County, N. Y. Co. No. 69–N. Y. Reg. No. 9101.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 28, 1919.

8 ANSWER.

District Court of the United States, Southern District of New York.

CHARLES G. A. PFITSCH, PETITIONER,
v.
UNITED STATES OF AMERICA, DEFENDANT.

The defendant above named, by its attorney, Francis G. Caffey, United States attorney for the Southern District of New York, answers the petition herein as follows:

I.

Upon information and belief defendant denies the allegation contained in the paragraph numbered IV of said petition.

II.

Defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph numbered VII of said petition.

III.

Upon information and belief defendant denies each and every allegation contained in the paragraph numbered IX of said petition.

Wherefore, the defendant demands judgment against the petitioner herein dismissing the said petition with costs.

FRANCIS G. CAFFEY,
United States attorney, attorney for defendant.

Office and post office address: United States Courts and Post Office Building, borough of Manhattan, city of New York.

9 STATE OF NEW YORK,
County of New York, Southern District of New York, ss.

Julian Hartridge, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of New York; that as such, he has charge of the within action and has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason why this verification is made by deponent and not by the defendant is because defendant is a corporation sovereign.

The sources of deponent's information and the grounds of his belief as to the matters in said answer stated upon information and

belief, are certified copies of the correspondence of the War Department and of the hearing held before the Board of Appraisers now in deponent's possession.

JULIAN HARTRIDGE.

Sworn to before me this 9th day of April, 1919.

CARL BRECHER,
[SEAL.] *Notary Public, etc.*

(Endorsed:) Due service of a copy of the within is hereby admitted, New York, April 10, 1919. Arthur B. King, attorney for petitioner. U. S. District Court, S. D. of N. Y. Filed Apr. 11, 1919.

10 At a stated term of the District Court of the United States for the Southern District of New York, held at the United States court rooms, in the U. S. Courthouse and Post Office Building, in the borough of Manhattan, city of New York, on the 18th day of July, in the year of our Lord one thousand nine hundred and nineteen.

Present: Honorable William I. Grubb, District Judge.

CHARLES G. A. PFITSCH,
vs.
UNITED STATES. } L. 19—381.

Now comes the plaintiff, by Arthur B. King, his attorney, and moves the trial of this cause. Likewise comes the defendant, by Francis G. Caffey, U. S. attorney, and Julian Hartridge, assistant U. S. attorney. At the close of the testimony on both sides, ordered judgment for the plaintiff for 1,827.32, which said amount includes interest up to and including July 25, 1919.

An extract from the minutes.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

11 DECISION AND FINDINGS.

United States District Court, Southern District of New York.

CHARLES G. A. PFITSCH, plaintiff,
vs.
UNITED STATES OF AMERICA, defendant. }

This action having regularly come on for trial before me, a judge of the United States District Court, sitting in and for the Southern District of New York, without a jury, on July 18, 1919, upon the pleadings and proceedings herein, and the plaintiff having appeared by Arthur B. King, Esq., his attorney, and the defendant having appeared by Julian Hartridge, Esq., its attorney, and the proofs of both parties having been adduced, and the respective counsel heard, and due deliberation having been had thereon, I do decide and find as follows:

FINDINGS OF FACT.

I.

The United States of America is a corporation created by the Constitution of the United States, with its principal office in the city of Washington, District of Columbia, and within the meaning of the definition in the New York Code of Civil Procedure, the said United States of America is a foreign corporation.

II.

At all times to which this action refers, plaintiff resided and still resides in the city of New Rochelle, Westchester County, State of New York, which is within the jurisdiction of this court, and at all of said times was and now is engaged in business in the city
12 of New York, under the trade name of International Bureau of Supplies.

III.

On April 18, 1918, plaintiff was the owner of one American full Universal radial drill, with single pulley drive, with gear box and drill table attached, which were then in the city of New York.

IV.

The fair market value of said drill and attachments on the 18th day of April, 1918, at New York City, was four thousand five hundred & fifty dollars.

V.

On said 18th day of April, 1918, at said city of New York, the United States of America, by its duly authorized agent, requisitioned said drill and attachments, and took the same from the possession of plaintiff, and has ever since retained possession of the same. That just compensation for said taking is the market value of the drill at the time of the taking, with interest thereon to date as hereinafter ascertained.

VI.

Thereafter the Board of Appraisers of the War Department of the United States of America made its award #29 to the International Bureau of Supplies for three thousand nine hundred seventy-nine and 50/100 dollars ($3,979.50), which the said Board of Appraisers stated was just compensation for the said property so taken. Plaintiff immediately requested a reconsideration of said award, and a hearing was had before said Board of Appraisers at the city of Washington, at which plaintiff was present with counsel, and thereafter said original award was confirmed.

VII.

That no part of said sum of $4,550 has been paid to plaintiff by defendant, except the sum of two thousand nine hundred eighty-four and 63/100 ($2,984.63) dollars, which was paid on February 5, 1919.

VIII.

That there is now due and owing to the plaintiff from the de-
13 fendant the sum of $1,565.37, with interest at 6% on $4,550 from April 18, 1918, to February 5, 1919, and interest on $1,565.37 from February 5, 1919, to the date hereof.

CONCLUSIONS OF LAW.

I.

The fair market value of said radial drill at New York City, on April 18, 1918, was $4,550.

II.

There is now due and owing to plaintiff from defendant the sum of $1,565.37, with interest at 6% on $4,550 from April 18, 1918, to February 5, 1919, amounting to $217.64, and interest on $1,565.37 from February 5, 1919, to the date hereof, amounting to $44.31.

III.

Plaintiff is entitled to recover of the defendant his costs, clerk's fees, and marshal's fees to be taxed by the clerk.

IV.

Plaintiff is entitled to judgment against the defendant in the sum of $1,827.32, together with said costs and fees amounting to $————, to be taxed by the clerk of this court.

July 25, 1919.

WM. I. GRUBB,
U. S. District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed July 25, 1919.

14 United States District Court, Southern District of New York.

CHARLES G. A. PFITSCH, PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

This action having regularly come on for trial before Hon. Wm. I. Grubb, a judge of the United States District Court, sitting in and

for the Southern District of New York without a jury, on July 18, 1919, upon the pleadings and proceedings herein, and the plaintiff having appeared by Arthur B. King, Esq., his attorney, and the defendant having appeared by Julian Hartridge, Esq., its attorney, and the proofs of both parties having been adduced, and the respective counsel heard, and due deliberation having been had thereon, and the court having made and filed on the 25th day of July, 1919, a decision in favor of the plaintiff, Charles G. A. Pfitsch, and against the defendant, United States of America, as hereinafter stated, with costs to plaintiff against the defendant to be taxed.

Now, on motion of Arthur B. King, attorney for plaintiff, it is

Adjudged, that the plaintiff do recover of the defendant the sum of $1,827.32, together with the further sum of $19.80 costs as taxed by the clerk, making in all the sum of $1,847.12, and that said plaintiff have execution therefor.

ALEX GILCHRIST, Jr., *Clerk.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed July 26, 1919, 10.20 a. m.

15 United States District Court, Southern District of New York.

CHARLES G. A. PFITSCH, PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.
} Notice of exceptions. L 19/381.

The defendant hereby excepts to the decision and findings of fact and conclusions of law herein filed in the office of the clerk of the United States District Court for the Southern District of New York on the 26th day of July, 1919, in the following particulars:

1. To so much of the finding numbered V, called a finding of fact, as decides as a matter of law that plaintiff is entitled to interest as part of just compensation for the taking therein mentioned.

2. To so much of the finding numbered VIII, called a finding of fact, as decides as a matter of law that there was due and owing to the plaintiff from the defendant interest on $4,550 at 6% from April 8, 1918, to February 5, 1919, and interest on $1,565.37 from February 5, 1919, to the date of said decision.

3. To so much of the conclusion of law numbered II as finds and decides that there was due and owing to the plaintiff from the defendant interest on $4,550 at 6% from April 18, 1918, to February 5, 1919, and interest on $1,565.37 from February 5, 1919, to the date of said decision.

4. To the conclusion of law numbered IV.

16 Dated New York, September 24, 1919

FRANCIS G. CAFFEY,
United States Attorney, Attorney for Defendant.

To the clerk of the United States District Court for the Southern District of New York.

To Arthur B. King, Esq., attorney for plaintiff, 128 Broadway, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 25, 1919.

17 ASSIGNMENTS OF ERROR.

United States District Court, Southern District of New York.

CHARLES G. A. PITSCH, PLAINTIFF,
against
UNITED STATES OF AMERICA, DEFENDANT. } L 19—381.

The United States of America, the defendant herein, hereby assigns error to the judgment of the District Court of the United States for the Southern District of New York in the above-entitled cause in the following particulars:

1. In that the court erred in allowing and adjudging interest against the United States of America and in favor of plaintiff from the date said radial drill was requisitioned to the date of rendition of judgment herein.

2. In that the court erred in allowing and adjudging interest against the United States of America and in favor of plaintiff from April 18, 1918, the date said radial drill was taken by the United States of America, to July 25, 1919, the date of the decision and findings herein.

3. In that the court erred in holding and determining that just compensation for the taking of the radial drill, the subject matter of this action, is the market value of the drill at the time of taking, together with interest thereon from the date of taking to the date of the decision and findings entered after trial of said action.

4. In that the court erred in including interest upon the
18 market value of said radial drill from the date of taking to the date of the decision and findings in this action as part of the compensation to be awarded the plaintiff herein.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Defendant.

Office and post office address: U. S. Courts and P. O. Bldg., city of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 23, 1919.

19 By the Honorable John C. Knox, one of the judges of the District Court of the United States for the Southern District of New York in the Second Circuit,

To Charles G. A. Pfitsch:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capital

in Washington, District of Columbia, on the 22 day of November, 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment of the said District Court in said writ of error mentioned should not be corrected and justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the District and Circuit above named, this 23d day of October, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-fourth.

JNO. C. KNOX,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

20 L 19/381. U. S. Supreme Court, Southern District of New York. United States Plff. in error versus Charles G. A. Pfitsch Deft. in error. Original citation. Francis G. Caffey, United States Attorney, Attorney for Plf. in error. Due service of a copy of the within is hereby admitted. New York, Oct. 24, 1919. Arthur B. King. U. S. District Court S. D. of N. Y. Filed Oct 25, 1919.

21 (Endorsed:) Supreme Court of the U. S. United States of America, plaintiff in error, agst Charles G. A. Pfitsch, defendant in error. Transcript of record. Error to the District Court of the United States or the Southern District of New York. Office of the clerk Supreme Court U. S. Received Feb. 12, 1920.

22 United States District Court, Southern District of New York.

CHARLES G. A. PFITSON
v.
UNITED STATES OF AMERICA. } L 19/381.

On reading and filing the subjoined consent and on motion of Francis G. Caffey, attorney for defendant, it is hereby

Ordered that the time within which to file the transcript of record in the Supreme Court of the United States be, and the same hereby is, extended to and including February 12, 1920.

Dated, January 30, 1920.

JOHN C. KNOX,
U. S. D. J.

Consented to.

ARTHUR B. KING,
Attorney for plaintiff.

24 Endorsed: Docket No. L 19/381. Form No. 336. U. S. District Court, Southern District of New York. Charles G. A. Pfitsch versus United States of America. Order. Francis G. Caffey, United States attorney, attorney for deft. Due service of a copy of Court, S. D. of N. Y. Arthur B. King, attorney for plff. To Arthur B. King, 61 B'way.

(Endorsement on cover:) File No. 27,474. S. New York, D. C. U. S. Term No. 719. The United States of America, plaintiff in error, vs. Charles G. A. Pfitsch. Filed February 12th, 1920. File No. 27,474.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
plaintiff in error,
v.
CHARLES G. A. PFITSCH.
} No. 246.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

This suit was instituted in the United States District Court for the Southern District of New York to recover the sum of $5,000, the alleged value of one American full Universal radial drill, with attachments, requisitioned by a duly authorized agent of the War Department and taken from the possession of defendant in error in the city of New York on April 18, 1918. Thereafter the Board of Appraisers of the War Department found the value of said drill and attachments on the date of taking to have been $3,979.50 and awarded said sum to defendant in error as just compensation therefor.

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Defendant in error protested against the amount thus found and awarded and refused to accept th same.

On February 5, 1919, $2,984.63, representing 75 per centum of the sum so found and awarded, was paid defendant in error; and on February 28, 1919, he exhibited his petition in the District Court, sitting as a court of claims pursuant to the terms of the Tucker Act of March 3, 1887 (chap. 359, 24 Stats. L. 505), as amended by the provisions of the Judicial Code (sec. 24, par. 20, and sec. 297, par. 7), to recover an additional $2,015.37, being the difference between $2,984.63 theretofore awarded and paid and $5,000 claimed as the value of the drill, together with interest at 6 per centum on $5,000 from April 18, 1918, to February 5, 1919, and interest at the same rate on $2,015.37 from February 5, 1919, to date of rendition of judgment. (See Petition, Rec. pp. 2–4.)

Thereafter the case duly came on for trial and the court, pursuant to the requirements of the Tucker Act and its amendments, filed specific findings of fact and conclusions of law. It was found and concluded among other things that the fair market value of said drill and attachments on April 18, 1918, at New York City, was $4,550; that just compensation for said drill and attachments was the market value at the time taken, together with interest thereon to date; that there was due and owing defendant in error the sum of $1,565.37 (the difference between $2,984.63 theretofore paid and $4,550), together with

interest at 6 per cent on $4,550 from April 18, 1918, to February 5, 1919, amounting to $217.64, and interest at the same rate on $1,565.37 from February 5, 1919, to date of judgment, amounting to $44.31, making an aggregate for principal and interest of $1,827.32. (Rec. pp. 7–8.) Judgment was accordingly rendered in favor of defendant in error and against the United States in the sum of $1,827.32, together with $19.80 costs, making in all $1,847.12. (Rec. pp. 8–9.) Exceptions were duly taken by the United States to so much of the findings of fact as decided a matter of law that defendant in error was entitled to and that there was due and owing him any sum as interest from the date of taking to the rendition of judgment. Exceptions were also noted to so much of the conclusion of law as decided that there was due and owing defendant in error any amount by way of interest. (Rec. p. 9.)

ASSIGNMENT OF ERRORS.

The errors assigned by the United States (plaintiff in error herein) are directed solely to the allowance of interest on the value of the drill and attachments from the date of requisition to the date of rendition of judgment, as well as for interest on any part of the value thereof for any intermediate period. (Rec. p. 10.) That is the single question for determination by this court in this proceeding.

ARGUMENT.

(a) Interest not recoverable against the United States in the Court of Claims.

The drill and attachments involved in this case were not taken under an express contract or pursuant to any formal proceeding in condemnation but were requisitioned.

Section 177 of the Judicial Code expressly prohibits the Court of Claims from allowing interest on any claim up to the time of rendition of judgment unless upon a contract expressly stipulating for the payment of interest. It has repeatedly been decided by this court that interest is never recoverable against the United States in the absence of statutory enactment or of an express contractual stipulation for the payment thereof. (*Tillson* v. *United States*, 100 U. S. 43; *Harvey* v. *United States*, 113 U. S. 243; *United States ex rel. Angarico* v. *Bayard*, 127 U. S. 251; *United States* v. *North Carolina*, 136 U. S. 211, 216; *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275; *Pennell* v. *United States*, 162 Fed. 75, 78.)

The recent decision of this court in *United States* v. *North American Transportation & Trading Company* (decided June 1, 1920; 253 U. S. 330) is controlling. Mr. Justice Brandeis in delivering the opinion of the court discussed at considerable length the distinction between cases where interest is allowed against the United States on account of real estate condemned "according to the laws of the State in which the land was situated" and cases where no condemnation proceedings were

conducted but the property taken or requisitioned, as in the present suit. It was held that under the latter circumstance interest could not be recovered against the United States as a part of the just compensation, since the right to bring the suit in the Court of Claims is not founded upon the fifth amendment, but upon the existence of an implied contract entered into by the United States, which contract is to pay the value of the property as of the date of taking.

(b) District court was sitting as a court of claims with like jurisdiction and limitations.

This case was instituted under the provisions of section 24, paragraph 20, of the Judicial Code, which confers jurisdiction upon the district courts concurrent with the Court of Claims of all claims not exceeding $10,000 founded upon the Constitution of the United States, or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, etc.

The district courts when proceeding under authority conferred by said sections possess the same jurisdiction, and that only, of the Court of Claims proper. (*United States* v. *Jones*, 131 U. S. 1, 16; *Reid* v. *United States*, 211 U. S. 529; *United States*

v. *Cress*, 243 U. S. 316, 331; *Strong* v. *United States*, 40 Fed. 183.)

It is true that section 177 of the Judicial Code, prohibiting the allowance of interest, was placed by the codifiers under chapter 7 of the code which relates to the Court of Claims. It has been held by this court, however, that in view of the provisions of sections 294 and 295, Judicial Code, declaring against any intent to change preexisting law by reason of the rearrangement and reclassification of the various sections, the provisions of chapter 7, in so far as they do not relate specifically to suits instituted in the Court of Claims proper, are applicable alike to suits brought against the United States in the district courts. (*United States* v. *Cress*, 243 U. S. 316, 330–332; *J. Homer Fritch (Inc.)* v. *United States*, 248 U. S. 458, construing secs. 294 and 295, Judicial Code, and holding that appeals and writs of error lie directly to this court.)

CONCLUSION.

It is submitted that the district court erred, and, in allowing interest against the United States, exceeded the powers conferred upon it by statute, and hence the judgment of the trial court should be reversed.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

P. M. COX, *Attorney,*
February, 1921.

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JAMES D. MAHER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 246.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

AGAINST

CHARLES G. A. PFITSCH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ROYAL E. T. RIGGS,
Amicus Curiae.

B. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, Plaintiff-in-Error, *against* CHARLES G. A. PFITSCH.	No. 246.

Stipulation.

We, the undersigned, counsel for the respective parties in the above entitled cause, do hereby consent that Royal E. T. Riggs, Esq., of New York City, who is counsel for various other claimants in actions pending against the United States of America, and interested in the decision of this cause, be permitted to file the annexed brief dated April 25th, 1921, as *amicus curiae*, copies of the brief having been heretofore served upon us.

April 21, 1921.

FRANK DAVIS, JR.,
Special Assistant to
the Attorney-General.

ARTHUR B. KING,
Counsel for
Charles G. A. Pfitsch.

Submitted by
ROYAL E. T. RIGGS,
Amicus Curiae.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, Plaintiff-in-Error, *against* CHARLES G. A. PFITSCH.	No. 246.

BRIEF.

This property was requisitioned and action instituted pursuant to Act of Congress of August 10, 1917 (40 Stats. at Large, p. 276), known as the Lever Act, under the provisions of Section 10 thereof, which is as follows:

> "The President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensa-

> tion therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

The court has ordered a reargument upon the question of jurisdiction, presumably as to whether an appeal from the judgment of the district court in such actions is taken directly to the Supreme Court of the United States, or to the Circuit Court of Appeals for the proper district, or whether an appeal lies at all.

ARGUMENT:

POINT I.

This court has jurisdiction directly in writs of error brought to review the judgment of the district courts in actions under Section 10 of the Lever Act.

The claim against the United States was in *assumpsit*. The action is, therefore, in the form of a common law action upon *assumpsit*. Proceedings relating to the seizure of property and the ascertainment of just compensation, therefore,

are analogous to actions at law and are reviewable by writ of error only.

> Chase *v.* United States, 155 U. S. 489.
> Armstrong's Foundry, 6 Wall, 766.
> Kohl *v.* United States, 91 U. S. 367.

In United States *v.* Gleeson, 124 U. S. (p. 258), the court said:

> "The United States can be sued for such causes and in such courts only as they have been by act of Congress permitted. Neither the Court of Claims nor this court can hear and determine any claim against the United States, except in the cases, and under the conditions, defined by Congress."

Section 10 of the Lever Act is entirely silent as to an appeal from a judgment of the district court. Every other section of the Lever Act providing for the requisitioning of property and the ascertainment of just compensation provides that the claimant, if dissatisfied with the compensation determined by the President, "shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation, in the manner provided by section twenty-four, paragraph twenty and section one hundred and forty-five of the Judicial Code." (See Sections 12, 16 and 25 of the Lever Act.) Under those sections, claimants are entitled to sue the United States in the district courts for amounts not exceeding $10,000, or they may file their claims in any amount with the Court of Claims under the jurisdiction conferred by Section 145 of the Judicial Code.

The Supreme Court has held that Sections 3, 5, 6 and 10 of the Tucker Act are still extant, and that appeals from judgments rendered in claims against the United States where the district court has concurrent jurisdiction with the Court of Claims lie directly to the Supreme Court of the United States.

Fritch *v.* United States, 248 U. S. 458.
United States *v.* Davis, 131 U. S. 36.
Chase *v.* United States, 155 U. S. 489.

It is apparent, therefore, that in Sections 12, 16 and 25 of the Lever Act, Congress permitted an appeal from a judgment of the district court directly to the United States Supreme Court, under the general provisions of Section 707 of the Revised Statutes providing for a review of judgments of the Court of Claims.

The question is, therefore, did Section 10 confer exclusive jurisdiction on the district courts or only concurrent jurisdiction with the Court of Claims? If this case is one in which the district court sat in lieu of, and having concurrent jurisdiction with the Court of Claims, a writ of error, if allowable at all, lies directly to the United States Supreme Court, under the provisions of Section 707 of the Revised Statutes.

Fritch *v.* United States, 248 U. S. 458.

It is well settled that where the United States of America appropriates private property for public purposes there is either an expressed or implied obligation arising from the Constitution of the United States upon the United States of America to make just compensation, and that

the Court of Claims had jurisdiction over such actions at the time of the passage of the Lever Act.

Kohl *v.* United States, 91 U. S. 367.
United States *v.* Great Falls Manufacturing Company, 112 U. S. 645.
United States *v.* Lynah, 188 U. S. 445.
United States *v.* Cress, 243 U. S. 316.

In Section 10 of the Lever Act, Congress has entered into an express contract with the owners of property requisitioned thereunder to make just compensation and simply added an additional forum for their relief.

Judge Chatfield of the District Court of New York, in striking out the defense of the United States of America that the Lever Act had been repealed by certain provisions of the Dent Act of March 3rd, 1919, stated in a similar case:

> "By Sections 10, 12, 16 and 25 of this law, the United States District Courts were granted jurisdiction to hear and determine controversies arising thereunder. In all the sections except Section 10, this jurisdiction was limited to amounts not exceeding $10,000.
>
> "Admittedly under all the sections, a claimant could have recourse to the Court of Claims concurrently with the District Court. Where the amount in controversy exceeds the sum above specified, the jurisdiction of the Court of Claims is exclusive, unless the cause of action arises under Section 10, where the jurisdiction is concurrent for all amounts." (Opinion Judge Chatfield, January 14th, 1920, Benedict *v.* United States. Not yet reported.)

By the Tucker Act of 1887, Congress had conferred jurisdiction of these claims upon the Court

of Claims. By the Act of August 10th, 1917, it also conferred jurisdiction upon the district courts to hear and determine such claims. Is there any evidence of the intention of Congress to repeal the provisions of the Tucker Act, depriving the Court of Claims of jurisdiction and conferring exclusive jurisdiction upon the district courts?

To find such a repeal, that implication must be the necessary deduction from the later statute (Wilmot *v.* Mudge, 103 U. S. 217). Positive repugnance must exist between the statutes (Frost *v.* Weenie, 157 U. S. 58). If they can be construed so as to be reconcilable, such construction should be taken rather than one which affects a repeal of the earlier law. (United States *v.* Greathouse, 166 U. S. 601.)

In the Lever Act, there is no implication of any intention to repeal the general provisions of law, nor is there positive repugnance between the statutes. They are not only reconcilable, but in accordance with the well known general policy of Congress to provide claimants with the election of resorting either to the Court of Claims or to the district court in the locality in which they reside in prosecuting claims against the United States. Section 10 of the Lever Act operated to extend jurisdiction of the district courts to unlimited amounts. That seems to have been its only purpose and effect.

Where the Court of Claims has jurisdiction over a cause against the United States, an appeal lies to the United States Supreme Court under the provisions of the Revised Statutes, whether or not the special act conferring jurisdiction provides for such an appeal.

Vigo's Case, 21 Wall. 648.

If the plaintiff had, therefore, filed this cause in the Court of Claims, the Court of Claims would have had jurisdiction thereof, and the judgment of the Court of Claims could only be reviewed directly by the United States Supreme Court.

Such being the circumstances, the district court, having concurrent jurisdiction with the Court of Claims, sits in lieu of the Court of Claims, and it would be unreasonable to expect that an appeal from its judgment would follow other channels than those of appeals from the Court of Claims.

In the *Fritch* case, this Court said:

> "When the United States made claims against it justiciable by conferring authority upon the court of claims to entertain and decide them, the grant was accompanied by a provision giving this court direct and exclusive jurisdiction to revise the judgments of the court of claims rendered in the exercise of the new power given. When by the Tucker Act (Act of March 3, 1887, 24 Stat. at L., 505, chap. 359) authority was conferred upon the circuit and district courts of United States to exert, concurrently with the court of claims, the power to decide claims against the United States, the question arose whether the judgments of those courts, rendered in the exercise of such jurisdiction, were reviewable exclusively and directly by this court.
>
> "Determining the principle by which the question was to be solved, it was decided that, in the absence of express provision or necessary implication to the contrary, the judgments of courts of the United States rendered as the result of the new power, would be subject to be reviewed only by the exclusive method theretofore provided for the court of claims. Applying the principle of interpretation thus announced to the Tucker Act, it was

> held that judgments of the courts of the United States in suits against the United States under that act were reviewable only directly by this court. United States *v.* Davis, 131 U. S. 36."
>
> *Fritch* v. *United States*, 248 U. S. p. 460.

The court further held that in Reid *v.* United States, 211 U. S. 529, the court had upheld the former decisions in United States *v.* Davis, *supra*, and that subsequent to the establishment of the Circuit Court of Appeals and at the present time exclusive right of review of causes against the United States lie directly in the United States Supreme Court.

In Reid *v.* United States, 211 U. S. 529, the court said, referring to an argument that the provision that claimants could not review judgments of the court of claims except where more than $3,000 was in controversy had been abrogated by later statutes:

> "Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose. Kawananakoa *v.* Polyblank, 205 U. S. 349, 553; 51 L. Ed. 834, 836; 27 Sup. Ct. Rep. 526. It has given a restricted permission and has created a pattern jurisdiction in the court of claims, with a limited appeal. The right to take up cases from that court by writ of error still is limited as heretofore. It would not be expected that a different rule would be laid down for other courts that, for convenience, are allowed to take its place, when originally the rule was the same. It does not seem to us that Congress has done so unlikely a thing."

See also United States *v.* Dalcour, 203 U. S. 408, holding that appeals in cases under Act of June 22, 1860, §11, were unaffected by creation of Circuit Courts of Appeal by Act of March 3, 1891.

It would not be expected that a different rule for appeals should be inferred for cases under Section 10 than that existing for all other causes against the United States, particularly in view of the fact that nowhere has Congress, either expressly or impliedly, suggested an intention to submit claims against the United States to the jurisdiction of the Circuit Court of Appeals, and in view of the well known policy of United States not to submit to any judgment not sanctioned by its highest court.

United States *v.* Dalcour, 203 U. S. 408.

Authority for an appeal to the Circuit Court of Appeals can only be found in the general provisions of Section 128 of the Judicial Code providing for the exercise of appellate jurisdiction by that court to review final decisions in the district court, but the difficulty is that Congress has not either expressly or directly consented that the Circuit Courts of Appeal of the United States should have jurisdiction in cases against the United States.

Clearly Congress intended either that no appeal should be taken, in which case this court would have no jurisdiction because of the lack of an explicit consent that causes under Section 10 against the United States may be reviewed in this or any other appellate court, or that this court should have jurisdiction by reason of the fact that the Court of Claims had jurisdiction over this cause of action, that the district court was sitting in lieu

of the Court of Claims, and that a review therefore may be had directly in this court under the authority of Vigo's case, *supra*, and Fritch *v.* United States, *supra*.

POINT II.

That plaintiff is entitled to interest as part of just compensation from the date of appropriation to the date of payment.

The court below has found that just compensation for the property appropriated included interest at 6%, the legal rate of interest in New York, from the date of appropriation to the date of payment.

This finding of fact cannot be attacked, and is not attacked in this court as being contrary to the evidence.

It is, therefore, established that just compensation in this action must include interest. This finding is as conclusive as if the court itself had computed the amount and made a finding as to an amount of just compensation sufficient to include it.

But it is urged that this court has no power to allow interest by reason of the prohibition of Section 177 of the Judicial Code, providing that interest does not run in claims against the United States "unless upon a contract expressly stipulating for the payment of interest."

The prohibition has no application to a proceeding to ascertain just compensation. A contract to pay just compensation, where by law just com-

pensation includes interest is a contract with such an express stipulation.

Under the laws of the State of New York, interest at the legal rate from the date of appropriation of property to the date of payment is part of the just compensation to which the owner is entitled under the Constitution of the State of New York and of the Constitution of the United States when private property is taken for public purposes.

> Matter of Mayor, 40 Appellate Division, 281.
>
> People *v.* Stillings, 136 Appellate Division, 438; affirmed 198 N. Y. 504.
>
> Matter of City of New York, 222 N. Y. 370.
>
> Matter of Minzesheimer, 144 Appellate Division, 576; affirmed 204 N. Y. 272.

> "Having taken the property of the plaintiff, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."
>
> Monongahela Navigation Company *v.* United States, 148 U. S. 312.

Just compensation for property taken by eminent domain includes interest from the date of appropriation.

> United States *v.* Rogers, 257 Fed., 397; affirmed in the United States Supreme Court, February 28, 1921.
>
> United States *v.* Sargent, 162 Federal, 81.
>
> United States *v.* Highsmith, affirmed in the United States Supreme Court February 28, 1921.

The case of *United States* v. *North American Transport & Trading Company, 253 U. S. 330,* is distinguishable from an action brought under Section 10 to recover just compensation to which the owner is entitled both by the Constitution and the pledge of Congress in the act. The *North American Transport & Trading Company* case involved an application to the Court of Claims for the value of use and occupation of land subsequent to its appropriation. This claim had been denied by the Court of Claims. It was argued by the claimant that interest might be awarded, and that the use and occupation value was equal to interest claimed. Also the original taking had not been ratified and was tortious.

In this case, the Court has found as a fact that just compensation to which the owner is entitled *must include interest.*

If the United States had taken claimant's property by eminent domain, interest would have been conceded.

United States *v.* Rogers (*supra*).

May the United States, by first requisitioning the property and remitting the owner to the privilege of suing, therefore, by a choice of the *method* of taking, change the amount of just compensation? Certainly not, for just compensation is a judicial question and beyond the power of Congress to limit or determine.

This proceeding is simply a reversed condemnation proceeding.

To deprive the owner of interest after such a finding of fact by the court below (which finding of fact cannot be reviewed in this court) would decrease and lessen the just compensation which

the good faith of the United States and the implicit pledge of Congress require to be made, and would be contrary to the provisions of the Constitution of the United States.

POINT III.

The judgment should be affirmed.

Respectfully submitted,

ROYAL E. T. RIGGS,
Amicus Curiae.

Dated, New York, April 25, 1921.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, Plaintiff in error.
v.
CHARLES G. A. PFITSCH. } No. 246.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES ON REARGUMENT.

STATEMENT.

The petition in the district court contained no averments as to the jurisdiction invoked. The record shows that the case was tried without a jury, and findings of fact and conclusions of law made by the court, thus conforming to the Court of Claims practice. As the amount involved was less than $10,000, it was assumed by the Government that the case had been submitted to the court under its concurrent jurisdiction with the Court of Claims. Therefore a writ of error was taken to this court, and in the opening brief of the Government the only question involved was the allowance of interest by the trial court. The brief for defendant in error took the position that the case was instituted under section

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10 of the Lever Act (Ch. 53, 40, Stat. 276) and therefore did not come under the concurrent jurisdiction of the district court. This raised directly the question of the jurisdiction of this court, it being conceded that if this case was not tried by the district court under its jurisdiction concurrent with the Court of Claims, the writ of error to this court was without foundation and should be dismissed.

The Government contends that the jurisdiction conferred upon the district courts by section 10 of the Lever Act is jurisdiction concurrent with the Court of Claims and is governed, except as to the amount involved, by section 24, paragraph 20, of the Judicial Code.

BRIEF OF ARGUMENT.

The Government can only be sued for causes of action and in the manner provided by law, and no court can entertain a suit against the Government unless jurisdiction is expressly conferred upon it by law. As to suits against the Government, what is not expressly granted is withheld. At the time of the passage of the Lever Act a jurisdiction for such suits was in existence, and unquestionably suits authorized by that Act would come under that jurisdiction. To take such suits out of that jurisdiction or to change it would require express provision. There is none in the Lever Act. The most that can be said is that it is silent upon the subject of appeal. Therefore the jurisdiction provided must apply. The rules of statutory construction, the prior decisions of this

court, and the situation that would result from any other construction make this construction of the Lever Act imperative.

BRIEF.

ARGUMENT.

SECTION 10 OF THE LEVER ACT CONFERS NO NEW JURISDICTION ON THE DISTRICT COURTS.

The jurisdiction of suits against the Government existing at the time of the passage of the Lever Act is found in section 145, and section 24, paragraph 20, of the Judicial Code, which are:

> SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late Civil War and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred

and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. (36 Stat. L., 1136.)

SEC. 24. The district courts shall have original jurisdiction, as follows: * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution

of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen

> hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (36 Stat. L., 1093.)

There is no other procedure provided for determining suits against the Government. The general provisions constituting parts of chapter 7 of the Judicial Code relating to the Court of Claims apply to the concurrent jurisdiction of the district courts under section 24, paragraph 20, of chapter 2. (*Fritch* v. *United States*, 248 U. S., 458; *United States* v. *Cress*, 243 U. S., 316, 331; *Reid* v. *United States*, 211 U. S., 529; *United States* v. *Davis*, 131 U. S., 36.)

The exercise of this exceptional jurisdiction by the district courts is limited, however, to claims not

exceeding $10,000 and a jury is prohibited. The denial of trial by jury emphasizes the fact that the procedure provided for the Court of Claims is to apply so far as possible to the court which for the convenience of the citizen is allowed to take its place in certain cases.

Section 10 of the Lever Act (act August 10, 1917, chap. 53, 40 Stat., 276, 279) contains not a word as to procedure or appeal. It provides:

> SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: *Provided*, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessaries held

> by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

The controversies which the district courts are given jurisdiction to hear and determine are claims against the United States. How is this jurisdiction to be exercised? The act is silent. It must, however, be read in connection with existing law, and under that law an available jurisdiction is ready; the jurisdiction especially provided for suits against the Government by section 24, paragraph 20, of the Judicial Code. The only change, or exception, necessary to accommodate the old law to this special provision is the removal of the limitation on the amount of the claim.

The catalogue of property that may be requisitioned under this law makes it obvious that "all such controversies" cannot be determined if the limitation of ten thousand dollars is to remain, but with this limitation removed, and it is the clear intent of the statute to remove it, there is not one feature of any such controversy that would make it in conflict with or exceptional to the jurisdiction provided. Every such claim could be asserted in the Court of Claims. There is nothing in the act which tends to deny the jurisdiction of the Court of Claims over cases of this character. It has jurisdiction over "all such controversies" regardless of amount, and in the absence

of the statute the district court would likewise have concurrent jurisdiction over "all such controversies" where the claim asserted did not exceed ten thousand dollars.

It seems clear that as the Government can only be sued for causes of action and in the manner provided by law that when a statute provides that suit may be brought against the Government and is silent as to procedure the existing procedure must apply.

All applicable rules of statutory construction show that cases brought under this act must be determined under the existing concurrent jurisdiction of the district courts.

The following statutes, each providing for the exercise of a power similar to that granted by section 10 of the Lever Act, provide for the preliminary determination of just compensation, and further provide that if the compensation so fixed is unsatisfactory to the person entitled to receive the same, he shall be paid a certain amount thereof, "and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation, in the manner provided by section 24, paragraph 20, and section 145 of the Judicial Code":

Act March 4, 1917, chap. 180, 39 Stat. 1168, 1193, Par. D. (This is a naval appropriation act, the heading under which this provision is found being "Naval emergency fund.")

Act June 15, 1917, chap. 29, 40 Stat. 182, 183 (emergency shipping fund act).

Act October 6, 1917, chap. 79, 40 Stat. 345, at 353 (proving grounds), and again at 371, 372 (acquisition of lands).

Act March 1, 1918, chap. 19, 40 Stat. 438, 439 (acquisition of houses, etc., by Shipping Board).

Act April 22, 1918, chap. 62, 40 Stat. 535 (authorizing the taking over of certain transportation systems, etc.).

Act July 1, 1918, chap. 114, 40 Stat. 704, 720 (authorizing the taking over of property, placing compulsory orders, etc.).

Act October 5, 1918, Chap. 181, 40 Stat. 1009, 1010 (providing for taking over of certain minerals).

The language in all of these acts is practically identical, with some variation as to amount of the preliminary payment; the direct reference in all cases being to section 24, paragraph 20, and section 145 of the Judicial Code.

In the Lever Act, approved August 10, 1917 (Chap. 53, 40 Stat. 276), section 10 of which gives rise to this case and which has been hereinbefore quoted, section 12, page 279, and section 25, pages 284, 285, contain the same provision that the suit may be brought against the United States in the manner provided by section 24, paragraph 20, and section 145 of the Judicial Code. In section 25 this provision is made twice. It is apparent from an examination of these statutes that they are all upon the same general subject; that is, the power of requisitioning or com-

mandeering property or the interference with the use thereof by the owner. The sections to which we have specifically referred are all upon the identical subject matter, namely, the ascertainment of just compensation to the owner of the property. Some of these provisions are in statutes passed before section 10 of the Lever Act, some in that act itself, some in acts passed afterward. The provision for the ascertainment of just compensation is also upon the same subject covered by general laws providing for suits against the Government, which, as has so often been demonstrated by this court, necessarily include suits for just compensation for property taken by the Government.

In all of these laws except section 10 of the Lever Act the procedure provided is that of section 145 and section 24, paragraph 20 of the Judicial Code. There is no other procedure provided by section 10 of the Lever Act. Therefore, if statutes on the same subject-matter and enacted for the same purpose are to be construed together so that there may be no repugnancy, and all such statutes are presumed to conform to the general scheme, it necessarily follows that there was no intent to create a new and exclusive forum for the determination of certain suits against the Government in which the procedure would be different in practically every respect from that theretofore existing. In the absence of any express provision of this character or of any language which would make an implication to that effect

necessary, the jurisdiction must be that already provided and which answers in every respect the needs of the situation.

There is another rule which seems to be strictly applicable here, namely, that only express words or an unavoidable implication can oust the jurisdiction of a superior court or vest a new jurisdiction in it. It has been settled conclusively that appeals from the Court of Claims or from a district court sitting as a Court of Claims can be taken only to this court, and that the review of suits against the Government is lodged exclusively in this court. The construction now sought to be placed on section 10 of the Lever Act would result in ousting this court of a part of this exclusive jurisdiction.. If suits brought under section 10 of the Lever Act are not brought in the district court sitting as a Court of Claims, but under its ordinary jurisdiction, then the appeal must be to the Circuit Court of Appeals, which under existing law has no power to review suits against the Government, and this would be brought about entirely by implication, for the Lever Act is absolutely silent as to appeal.

In *Black* on "Interpretation of Laws," second edition, section 50, at page 139, it is stated (quoting from Endlich, Sec. 155):

> * * * As it is presumed the legislature would not effect a measure of so much importance as the ouster or restriction of the jurisdiction of the superior courts without an explicit expression of its intention, so it is

> equally improbable that it would create a new, especially a new and exclusive, jurisdiction with less explicitness; and therefore a construction which would impliedly have this effect is to be avoided.

At one time a practice had come into use of allowing judgment to be taken against the Government *pro forma* in the Court of Claims in cases where the the amount involved was less than the amount necessary to make an appeal available to the claimant, thus securing a review by this court as there is no limitation upon the Government with reference to appeals. The irregularity of this practice was called to the attention of this court in the case of *United States* v. *Gleeson*, 124 U. S., 255. The court stated in its opinion (p. 258):

> The United States can be sued for such causes and in such courts only as they have by act of Congress permitted. Neither the Court of Claims nor this court can hear and determine any claim against the United States, except in the cases, and under the conditions, defined by Congress.

And again on page 259:

> The effect of this way of disposing of the case, if sanctioned by this court, would be to nullify the restriction put by Congress upon appeals from the Court of Claims, to subject the United States to be impleaded in this court without their consent. * * *

The United States has never consented to have suits against it reviewed in the Circuit Court of Ap-

peals, and there is no provision to this effect in section 10 of the Lever Act.

Prior decisions of this court are conclusive.

As stated before, section 10 of the Lever Act is entirely silent on the question of appeal. As strong an argument that the appeal, therefore, must be to the Circuit Court of Appeals can not be made under this statute as was made under the Tucker Act (act of March 3, 1887, ch. 359, 24 Stat. 505) reviewed in the case of *United States* v. *Davis*, 131 U. S. 36. Section 2 of that act conferred jurisdiction upon the district courts concurrent with the Court of Claims. Section 9 gave the right of appeal both to the plaintiff and the Government, but was silent as to what statutes should govern the appeal. The court stated (p. 39):

> Inasmuch as the object of the latter act was to enable the district and circuit courts to exercise concurrent jurisdiction with the Court of Claims in respect to suits against the United States, as therein provided, in our judgment the right of appeal reserved to the Government "in the statutes of the United States in that behalf made" before the enactment of this act, was the right of appeal reserved in the statutes relating to the Court of Claims, and as that right could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of

the prosecution of a claim in the District or Circuit Courts of the United States under said act.

For our argument upon this phase of the case we adopt the following quotations from two opinions of this court. The first from *Reid* v. *United States*, 211 U. S., 529, 538, and the second from *Fritch* v. *United States*, 248 U. S., 458, 460.

> Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose. *It has given a restricted permission and has created a pattern jurisdiction* in the Court of Claims, with a limited appeal. The right to take up cases from that court by writ of error still is limited as heretofore. It would not be expected that a different rule would be laid down for other Courts that *for convenience* are allowed to take its place, when originally the rule was the same. It does not seem to us that Congress has done so unlikely a thing. (*Reid* v. *United States.*)
>
> When the United States made claims against it justiciable by conferring authority upon the Court of Claims to entertain and decide them, the grant was accompanied by a provision giving this court direct and exclusive jurisdiction to review the judgments of the Court of Claims rendered in the exercise of the new power given. When by the Tucker Act (act of March 3, 1887, c. 359, 24 Stat. 505) authority was conferred upon the circuit and district courts of the United States to exert, concurrently with the Court of Claims,

the power to decide claims against the United States, the question arose whether the judgments of those courts rendered in the exercise of such jurisdiction were reviewable exclusively and directly by this court.

Determining the principle by which the question was to be solved, it was decided that in the absence of express provision or necessary implication to the contrary, the judgments of courts of the United States rendered as the result of the new power would be subject to be reviewed only by the exclusive method theretofore provided for the Court of Claims. Applying the principle of interpretation thus announced to the Tucker Act, it was held that judgments of the courts of the United States in suits against the United States under that act were reviewable only directly by this court. *United States* v. *Davis,* 131 U. S. 36; (*Fritch* v. *United States.*)

The effect of construing this act as granting a new jurisdiction.

A construction of this statute to the effect that the district court under it does not exercise its jurisdiction concurrent with the Court of Claims would lead to discrimination for which there is no justification.

There is no real distinction between the suits authorized against the Government by section 10 of the Lever Act and suits authorized against the Government by the many other statutes which we have quoted, or by the general laws providing for suits against the United States. There is no reason

apparent why the general provisions of the law should not apply to all claimants. It is somewhat difficult to appreciate why the limitation on amount of claims that may be asserted in the district court under its concurrent jurisdiction should be removed from cases of this character and allowed to remain as to all other cases; but this has been done, expressly as we think, and the authority of Congress to do so can not be questioned. While the language of the act removing this limitation is not express, still the inference that it is removed is unavoidable, or otherwise it would be, as we have pointed out, impossible for the district courts to determine "all such controversies." We think, too, that the limitation is removed in all other acts referred to because they allow the ascertainment of just compensation in the manner provided by section 145 and section 24, paragraph 20, of the Judicial Code, and make no distinction as to the jurisdiction in which the suit shall be brought. It seems that it would be rather a strained construction of these statutes to hold that they should be construed as saying that such suits may be brought under section 145 of the Judicial Code, or section 24, paragraph 20, if the amount claimed does not exceed $10,000. The authority is to prosecute a claim for just compensation in the *manner* provided. As nothing is said as to the limitation upon amount, it should not be read into the statute.

If it is held that the district court in cases arising under section 10 sits as a district court and not as a

Court of Claims, then a claimant suing under that section will be entitled to a trial by jury, to interest, and to an appeal to the Circuit Court of Appeals under section 128 of the Judicial Code (sec. 238 plainly not applying to such cases), all by inference, and each and all of these rights being nonexistent as to any other claimant against the United States; the Supreme Court will be ousted from a part of its appellate jurisdiction and appellate jurisdiction will be conferred upon the Circuit Courts of Appeals, which they have never before had. A claimant having a claim of less than $10,000, such as the plaintiff in this case, will have three jurisdictions open to him: First, the Court of Claims, because there is nothing in the act that in any way deprives the Court of Claims of its jurisdiction over cases of this character. Second, under the concurrent jurisdiction of the district courts. There is nothing in the act which in any way denies the exercise of this concurrent jurisdiction to cases of this character. Third, the ordinary jurisdiction of the district court. So that it would be quite possible for a claimant to decide which jurisdiction of the district court he desired to invoke upon his cause of action, that which would give him a trial by jury, or that in which no jury could be had; that from which an appeal could go only to this court, or that which would be reviewable by the Circuit Court of Appeals. It is submitted that it would require express and explicit language to bring about such a situation and that as there is no such language and no general language from which any such implication

could be justifiably made, the necessary deduction must be that Congress has not "done so unlikely a thing," and that the pattern jurisdiction which it has created in allowing suits against the Government must be followed, as it is the only jurisdiction applicable.

The question as to whether or not the claimant is entitled to a trial by jury has been raised in at least two cases, namely: *The Filbin Corporation et al* v. *United States*, 266 Fed. 911 (District Court S. C., Eastern Div.), and *United States* v. *McGrane*, very recently decided by the Circuit Court of Appeals for the Third Circuit and not yet reported. In both of these cases it was decided that the right of trial by jury existed and thus inferentially that the cases were ordinary cases for the district court. We do not regard these decisions as important or at all controlling because the primary question as to whether the concurrent jurisdiction of the Court of Claims applies or not, upon the determination of which the right of trial by jury incidentally depends, was given little, if any, consideration. In several other cases no question at all has been raised as to the jurisdiction and the case has been submitted to the court upon a stipulation waiving a jury or because no jury was demanded by either side. One case at least has been tried before a jury, but in none of the cases has the real question as to the jurisdiction been presented.

CONCLUSION.

It is respectfully submitted that the writ of error to this court was properly taken, and that this court has exclusive jurisdiction to review all suits against the United States.

FRANK DAVIS, JR.,
Special Assistant to the Attorney General.

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No. 246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,

Plaintiff-in-Error,

vs.

CHARLES G. A. PFITSCH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR CHARLES G. A. PFITSCH.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,
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BRIEF FOR CHARLES G. A. PFITSCH.

The statement of facts contained in the brief for the United States is not controverted except in the following particulars. The suit was instituted for $2,015.37 with interest instead of for $5,000.00, as stated in the Government's brief. The award of the Board of Appraisers of the War Department was made *before* suit was instituted, whereas in the use of the word "thereafter" in the second sentence of the Government's brief, it might appear that such award was made subsequent to such time. As hereinafter pointed out, defendant-in-error does not admit that the district court was sitting as a court of claims, as stated in the Government's brief.

The property was requisitioned and this action instituted pursuant to Act of Congress of August 10th, 1917, Section 10 (United States Compiled Statutes, 1916, 1919 Supplement, Title XVII A—National Defense, Section 3115-⅛ ii, Requisition of Supplies for Army or Navy), which reads, in part, as follows:

> "The President is authorized, from time to time, to requisition foods, fuels and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense—: *and he shall ascertain and pay a just compensation therefor.* If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and he shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such necessaries * * * and jurisdiction is hereby conferred upon the United States District Courts to hear and determine *all* such controversies." (Italics ours.)

We submit that since the section confers jurisdiction upon the District Courts exclusively to hear *all* such controversies, irrespective of the amount involved, the District Court was not, in this action, sitting as, nor was its jurisdiction limited to that of, a court of claims, as contended by the Government.

ARGUMENT:

POINT I.

The right to bring this suit is founded upon the Fifth Amendment to the Constitution.

The rights guaranteed by the Fifth Amendment are expressly reasserted by the statute above quoted, which requires the President *to pay just compensation for the property requisitioned.* It follows that there is no question of implied contract in this case, as the Government contends.

POINT II.

Interest was properly allowed.

United States vs. *Rogers,* 257 Fed., 397, affirmed in the United States Supreme Court, Feb. 28, 1921;

United States vs. *Highsmith,* 257 Fed., 401, affirmed in the United States Supreme Court, Feb. 28, 1921;

United States vs. *Sargent,* 162 Fed., 81;

United States vs. *Nahant,* 153 Fed., 520;

Town of Hingham vs. *United States,* 161 Fed., 295.

While the above cases involved condemnation of real property under the conformity provisions of the Federal statute, we submit that interest is an inseparable part of just compensation, irrespective of the nature of the property taken or of the fact

that, as here, because of the requirement of the statute, Pfitsch was the nominal plaintiff.

In United States vs. Sargent, supra, the Court said:

> "Without holding that the requirement for payment of interest is one of the modes of proceeding, which, by Section 2 of the act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands, at the time of taking."

In U. S. vs. Nahant, supra, the Court said:

> "The paramount law intends that the owner shall be put in as good position pecuniarily by a just compensation as he would have been if the property had not been taken. Lewis on Eminent Domain, paragraph 464. In our view it is almost, if not quite, an element of the government's case to see to it that just compensation is ascertained and accorded. The question of just compensation contemplated by the Constitution is more an equitable question than a strictly legal or technical one. * * * The equitable rule sustained by authorities (Lewis on Eminent Domain, 499, note 44), which under certain circumstances permits the adjustment between the value of the property and interest, is said to be one

> derived from the constitutional provision requiring just compensation."

This doctrine of including in just compensation the element of interest was considered by this Court in United States vs. North American Transportation & Trading Company, 253 United States, 330, cited in the Government's brief, where this Court said:

> "This may be the theory on which interest should be allowed in compensation proceedings; and it may be that even in the absence of the conformity provision referred to above interest should be collected as a part of the just compensation in condemnation proceedings brought by the Government."

Unquestionably this is a compensation proceeding and in principle it is, we submit, a condemnatian proceeding insofar as the just compensation doctrine is involved.

The country was at war when the statute was enacted, and as an emergency measure Congress authorized the President to take, without prior application to court, any property deemed necessary. The President was made the sole judge, in the first instance, of the just compensation to be paid, and in this case, by delegated authority, exercised this judicial function, but, as the Court found, erroneously. No direct appeal lay from such determination, and Pfitsch was required, as plaintiff, to institute suit *de novo* in the District Court to secure his constitutional rights. The whole proceeding was in effect an adversary one

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BRIEF ON RE-ARGUMENT FOR CHARLES G. A. PFITSCH.

Re-argument having been ordered on the question of jurisdiction, we shall briefly consider the question, although, as hereinafter shown, we claim that whatever decision this Court may make in respect thereof can in no way affect Pfitsch's ultimate rights.

Section 10 of the Act of Congress, referred to in our main brief, confers upon the District Court jurisdiction "to hear and determine *all* controversies" of this nature. This language apparently confers exclusive jurisdiction upon the District Court. It is true that other sections of the Act, relating to other classes of property, authorize the owners to proceed pursuant to the provisions of the Judicial Code relating to the con-

current jurisdiction of the Court of Claims and District Courts. The question is, what was the intention of Congress? The Government contends that the language of Section 10 was intended merely to remove the $10,000 jurisdictional limitation. Since, in the other sections of the Act, Congress took pains to specify in exact language the manner in which suits might be instituted, it is fair to assume that the failure to incorporate similar provisions in Section 10 was deliberate. Section 10 is devoid of any language indicating the manner in which an appeal is to be taken from a judgment of the District Court in a controversy arising under the section. Section 128 of the Judicial Code provides that appeals from the District Court shall be taken direct to the Circuit Court of Appeals in all cases where an appeal does not lie direct to the Supreme Court, unless otherwise provided by law. It would therefore seem to follow that the judgment herein was appealable only to the Circuit Court of Appeals.

It is a cardinal rule of statutory construction that where the language used is unambiguous a departure from its natural meaning is not justified.

U. S. vs. Musgrave, 160 Federal, 700.

The language of Section 10, being unambiguous, should be given its ordinary meaning which, we submit, is that jurisdiction of this case was vested exclusively in the District Court sitting as a District Court and not as a Court of Claims.

Assuming, however, that the appeal *does* lie, the judgment of the court below should, nevertheless, be affirmed, for the following reasons:

FIRST.—The constitution and the statute pursuant to which the property was taken require just compensation to be paid therefor.

SECOND.—Just compensation means a full and perfect equivalent for the taking; the ascertainment of just compensation is a judicial inquiry and no Act of Congress (such as Section 177 of the Judicial Code) can limit or cut down that compensation.

> Monongahela Navigation Co. vs. U. S., 148 U. S., 312.

THIRD.—The District Court found as matter of fact that just compensation included interest from the time of the taking (Record, page 7). This finding of fact cannot be reviewed by writ of error (Behn vs. Campbell, 205 U. S., 403).

FOURTH.—Interest is part of just compensation.

This Court in its opinion in the Rogers case, cited but, because the opinion was not then available, not quoted in our main brief, said:

> "We agree with the court below that the allowance of just compensation by giving interest from the time of the taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."

FIFTH.—The legal rate of interest in New York is 6%.

> Laws of New York, 1909, Chapter 25, Section 370.

SIXTH.—The owner of personal property requisitioned is entitled to the same degree of just compensation as is the owner of real property condemned. This proposition is self-evident.

CONCLUSIONS.

1. The appeal should be dismissed for want of jurisdiction, or

2. If jurisdiction exists, the judgment of the Court below should be affirmed.

Respectfully submitted,

ARTHUR B. KING,
Attorney for Charles G. A. Pfitsch.

Dated April 15, 1921.